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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12
13 UNITED LEVAO,

CASE NO. 10-CV-1040 W (NLS)

14 vs. Petitioner,
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16 D.T. LEWIS, Warden,

17 ORDER(1) ADOPTING REPORT
18 AND RECOMMENDATION
19 [DOC. 9], (2) OVERRULING
20 PETITIONER'S OBJECTIONS
 [DOC. 11], AND (3) DENYING
 MOTION FOR STAY AND
 ABEYANCE [DOC. 3]

21 Respondent.

22 On May 13, 2010, Petitioner United Levao, a California prisoner proceeding *pro
se*, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (“Petition”), and
23 a motion to stay the federal habeas proceedings and hold the Petition in abeyance.
24 Respondent D.T. Lewis opposes the motion.

25 On July 29, 2010, United States Magistrate Judge Nita L. Stormes issued a Report
26 and Recommendation (“Report”) recommending that this Court deny the motion for
27 stay and abeyance. Petitioner filed an objection to the Report. Respondent did not file
28 a reply.

1 The Court decides the matters on the papers submitted and without oral
 2 argument. See Civ. Local R. 7.1(d)(1). For the reasons outlined below, the Court
 3 **ADOPTS** the Report in its entirety (Doc. 9), **OVERRULES** Petitioner's objections
 4 (Doc. 11), and **DENIES** Petitioner's motion for stay and abeyance (Doc. 3).

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6 **I. BACKGROUND**

7 In 2006, Petitioner was convicted in San Diego Superior Court of first-degree
 8 murder with enhancements for personal use of a firearm and commission of a crime for
 9 the benefit of a gang. (Pet. ¶¶ 1–6 [Doc. 1]; Resp't's Opp'n Ex. D, at 56 [Doc. 6-1].) The trial court sentenced Petitioner to state prison for 25 years to life for the murder
 10 conviction, added a consecutive 25 years to life for the firearm enhancement, and stayed
 11 the sentence on the gang enhancement. (Pet. ¶¶ 4–6; Resp't's Opp'n Ex. D, at 56.)

12 Petitioner raised four individual claims on direct appeal. (Resp't's Opp'n Ex. D,
 13 at 13, 22–51.) On November 12, 2008, the California Court of Appeal rejected
 14 Petitioner's claims and affirmed the trial court's judgments, but with modifications based
 15 on grounds separate from Petitioner's individual claims.¹ (Pet. ¶ 11; Resp't's Opp'n Ex.
 16 D, at 70.) Petitioner pursued review in the California Supreme Court, but his Petition
 17 for Review was denied. (Pet. ¶ 12; Resp't's Opp'n Ex. C, at 10.)

18 On May 6, 2010, Petitioner began pursuing his state-court remedies when he
 19 delivered his state habeas petition to prison authorities. (Pet. ¶ 24; Resp't's Opp'n Ex. B,
 20 at 3.) On May 13, 2010, he filed a Petition a for Writ of Habeas Corpus under 28

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 22
 23 ¹ Petitioner also raised two joint claims with his co-defendant challenging the admission
 24 of gang evidence to prove the gang-enhancement allegation and the sentence for the gang
 25 enhancements. (Resp't's Opp'n Ex. D, at 13, 22–51.) The California Court of Appeal rejected
 26 the challenge regarding the admission of gang evidence, but found that the trial court erred in
 27 imposing and staying the ten-year gang enhancement. (*Id.* at 57–62.) As a result of the
 28 finding, the California Court of Appeal modified the judgment against Petitioner by striking
 the ten-year gang enhancement and imposing 15-year-minimum parole-eligibility terms. (*Id.*
 at 70.)

1 U.S.C. § 2254, and a motion to stay the federal habeas proceedings and hold the
2 Petition in abeyance.

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Petitioner’s one-year statute of limitations to file a federal habeas petition expired on May 12, 2010.² (Pet. ¶ 12.) On June 10, 2010, Respondent filed his opposition to the stay-and-abeyance motion. Petitioner filed his reply on July 19, 2010. Also, on June 10, 2010, Petitioner filed a petition for writ of habeas corpus in San Diego Superior Court. (Resp’t’s Opp’n Ex. B, at 3–6.)

On July 29, 2010, Magistrate Judge Stormes issued the Report finding that Petitioner filed a mixed petition containing exhausted and unexhausted claims. (Report 1–2 [Doc. 9].) Petitioner exhausted his state-court remedies with respect to the first four claims raised on direct appeal, but not the five additional claims raised in his federal habeas petition. (*Id.*; see Pet., Attach. 1, at 5–13.) As such, the Report recommended that this Court deny the motion for stay and abeyance, but presented Petitioner with options for moving forward with his Petition. (*Id.* at 7.) On August 26, 2010, Petitioner filed his objection to the Report. Respondent did not file a reply.

18 || II. LEGAL STANDARD

19 A district court's duties concerning a magistrate judge's report and
20 recommendation and a respondent's objections thereto are set forth in Rule 72(b) of the
21 Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). When no objections are
22 filed, the district court is not required to review the magistrate judge's report and
23 recommendation. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir.

² The AEDPA applies a one-year statute of limitations to federal habeas corpus petitions once the state-court judgment becomes final. Petitioner's state-court judgment became final on May 12, 2009, 90 days after the California Supreme Court denied his Petition for Review. (Pet. ¶ 12.) Thus, Petitioner's one-year statute of limitations began to run May 13, 2009.

1 2003) (holding that 28 U.S.C. § 636(b)(1)(c) “makes it clear that the district judge
 2 must review the magistrate judge’s findings and recommendations *de novo if objection*
 3 *is made, but not otherwise*”) (emphasis in original); Schmidt v. Johnstone, 263 F. Supp.
 4 2d 1219, 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the
 5 district court had no obligation to review the magistrate judge’s report). This rule of law
 6 is well established within the Ninth Circuit and this district. See Wang v. Masaitis, 416
 7 F.3d 992, 1000 n.13 (9th Cir. 2005) (“Of course, *de novo* review of a R & R is *only*
 8 required when an objection is made to the R & R.”) (emphasis added) (citing Renya-
 9 Tapia, 328 F.3d at 1121); Nelson v. Giurbino, 395 F. Supp. 2d 946, 949 (S.D. Cal.
 10 2005) (Lorenz, J.) (adopting report without review because neither party filed objections
 11 to the report despite the opportunity to do so, “accordingly, the Court will adopt the
 12 Report and Recommendation in its entirety.”); see also Nichols v. Logan, 355 F. Supp.
 13 2d 1155, 1157 (S.D. Cal. 2004) (Benitez, J.).

14 In contrast, the duties of a district court in connection with a magistrate judge’s
 15 report and recommendation are quite different when an objection has been filed. These
 16 duties are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C.
 17 § 636(b)(1). Specifically, the district court “must make a *de novo* determination of those
 18 portions of the report . . . to which objection is made,” and “may accept, reject, or
 19 modify, in whole or in part, the findings or recommendations made by the magistrate.”
 20 28 U.S.C. § 636(b)(1)(c)); see also United States v. Raddatz, 447 U.S. 667, 676 (1980);
 21 United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989).

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 23 III. DISCUSSION

24 A. Petitioner Has Not Demonstrated Good Cause for His Failure to
 25 Exhaust State Court Remedies.

26 A district court may not grant a petition for writ of habeas corpus unless the
 27 petitioner exhausted available state-court remedies. 28 U.S.C. § 2254(b)(1); Rose v.
 28 Lundy, 455 U.S. 509, 522 (1982) (holding that a federal district court must dismiss

1 “mixed petitions” containing claims that have not been exhausted in state courts). In
 2 order to satisfy the exhaustion requirement, a petitioner must “fairly present[] his
 3 federal claim to the highest state court with jurisdiction to consider it . . . or . . .
 4 demonstrate[] that no state remedy remains available.” Johnson v. Zenon, 88 F.3d 828,
 5 829 (9th Cir. 1996) (citing Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v. Connor,
 6 404 U.S. 270, 275 (1971)). Furthermore, to “fairly present” a federal claim to the state
 7 court, a petitioner must specifically “alert the state court[] to the fact that he was
 8 asserting a claim under the United States Constitution.” Hiivala v. Wood, 195 F.3d
 9 1098, 1106 (9th Cir. 1999) (citing Duncan v. Henry, 513 U.S. 364, 365-66 (1995)).
 10 The mere similarity between a claim of state and federal error, and general appeals to
 11 broad constitutional principles are insufficient to establish exhaustion. Id. (citing Gray
 12 v. Netherland, 518 U.S. 152, 162-63 (1996); Duncan, 513 U.S. at 366).

13 A district court may grant a stay and abeyance for a mixed petition “only in
 14 limited circumstances.” Rhines v. Weber, 544 U.S. 269, 276-77 (2005). Specifically,
 15 a stay-and-abeyance order is appropriate *only when*: (1) good cause exists for the
 16 petitioner’s failure to exhaust; (2) the petitioner’s unexhausted claims are not “plainly
 17 meritless;” and (3) there is no indication that the petitioner engaged in “abusive
 18 litigation tactics or intentional delay.” Id. at 277-78; Robbins v. Carey, 481 F.3d 1143,
 19 1149 (9th Cir. 2005).

20 However, “good cause” under Rhines is not clearly defined. In the Ninth Circuit,
 21 good cause is, without further clarification, less stringent than the “extraordinary
 22 circumstances” standard for equitable tolling of the statute of limitations. See Jackson
 23 v. Roe, 425 F.3d 654, 656 (9th Cir. 2005). District courts within the Ninth Circuit have
 24 more narrowly defined the standard. Some have required the showing of “some
 25 objective factor external to the petitioner” that prevented timely exhaustion.
 26 Hernandez v. Sullivan, 397 F. Supp. 2d 1205, 1207 (C.D. Cal. 2005). Others have
 27 equated the good-cause standard to “excusable neglect.” See Corjasso v. Ayers, No.
 28 CIVS970018GEBGGHP, 2006 WL 618380, at *1 (E.D. Cal. Mar. 9, 2006). The latter

1 interpretation considers factors such as prejudice to the non-moving party, length of the
 2 delay and its effect on efficient court administration, and whether the delay was caused
 3 by factors beyond the control of the movant, and good faith. Id. at 1.

4 Here, Petitioner's good-cause showing for his failure to exhaust his claims prior
 5 to seeking federal habeas relief is clearly deficient. Petitioner blames his failure to
 6 exhaust his state-court remedies on a change in the Pelican Bay State Prison copy
 7 policy. (*Pet'r's Objection* 2–3 [Doc. 11].) However, Petitioner claims he was ready to
 8 mail out his state habeas petition on May 6, 2010 when he sought photocopies. (*Id.* at
 9 2–3.) Also, when Petitioner went to the prison law library to make photocopies, prison
 10 authorities informed him that he would lose possession of his state habeas petition until
 11 May 25, 2010 while the prison made a decision regarding his request. (*Id.*) In spite of
 12 knowing that the prison authorities would not return his state habeas petition before
 13 May 12, 2010—when the statute of limitations for filing his federal habeas petition
 14 would expire—Petitioner requested photocopies. (*Id.*) That is, he could have timely
 15 filed his state habeas petition but chose not to do so. (*See id.*) Thus, the delay was not
 16 caused by any objective external factors beyond Petitioner's control, but rather
 17 Petitioner himself. *See Corjasso*, 2006 WL 618380, at *1; *Hernandez*, 397 F. Supp. 2d
 18 at 1207.

19 Furthermore, Petitioner had one year to exhaust his state-court remedies.
 20 Petitioner was aware of the factual basis for all of the unexhausted claims since his
 21 conviction became final because all of the claims are based on events that occurred at
 22 trial, and he received his legal papers on April 9, 2009. (*See Pet.* ¶¶ 11–22.) But
 23 Petitioner has not explained why it took him almost one year to prepare and file his
 24 state habeas petition. He had ample time to exhaust his claims but did not use the time
 25 he had available to do so. Also, Petitioner requested photocopies on May 6, 2010 and
 26 received a response from the prison by May 21, 2010. (*Pet'r's Objection* 2; *Pet'r's Mot.*,
 27 Attach. 2 at 17 [Doc. 3].) Any delay allegedly caused by the prison's change in the copy
 28 policy is nominal relative to the one year Petitioner had to prepare and file his state

1 habeas petition following the finality of his conviction. See 28 U.S.C. § 2244(d)(1)(A)-
 2 (D).

3 Based on the above, Petitioner failed to demonstrate good cause for his failure to
 4 exhaust his claims in state court.³ He has neither shown “some objective factor external
 5 to [him]” that prevented timely exhaustion, nor “excusable neglect.” See Corjasso,
 6 2006 WL 618380, at *1; Hernandez, 397 F. Supp. 2d at 1207. Therefore, the stay-and-
 7 abeyance procedure is not appropriate.

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9 **B. To Avoid the Court Dismissing the Petition, Petitioner Must Choose**
 10 **One of the Following Options.**

11 Based on the fact that the petition is mixed and to avoid the Court dismissing the
 12 Petition on its own accord, Petitioner must choose one of the following options.

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14 **1. *First Option: File a Motion for Withdrawal and Abeyance***

15 A second method of staying a timely federal habeas petition while a petitioner
 16 returns to state court to exhaust unexhausted claims is the “withdrawal and abeyance”
 17 procedure. Robbins v. Carey, 481 F.3d 1143, 1148 (9th Cir. 2007) (citing Calderon v.
 18 Dist. Court (Taylor), 134 F.3d 981, 986 (9th Cir. 1988)) (approving the withdrawal-
 19 and-abeyance procedure, also known as the Taylor stay-and-abeyance procedure);
 20 Olvera v. Giurbino, 371 F.3d 569, 572-73 (9th Cir. 2004); Smith v. Giurbino, No.
 21 06cv700, 2008 WL 80983, *3 (S.D. Cal. Jan. 7, 2008) (Gonzalez, C.J.) (citing Kelly v.
 22 Small, 315 F.3d 1063, 1070 (9th Cir. 2002)). Unlike the stay-and-abeyance procedure,

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24 ³ Petitioner argues the Court should apply a “reasonable confusion” standard to show
 25 good cause. Pace v. Diguglielmo, 544 U.S. 408, 416 (2005) (stating in *dictum* that “reasonable
 26 confusion” about timeliness rules would “ordinarily” constitute good cause). Even if the Court
 27 applied this standard, Petitioner failed to provide any evidence to show reasonable confusion
 28 regarding his understanding of timeless rules. In fact, Petitioner showed a clear understanding
 of when the statute of limitations expired and how the date was calculated. (*Pet’r’s Mot.*
 2:8-13.)

1 a petitioner seeking to use the withdrawal-and-abeyance procedure need not show good
2 cause for his failure to exhaust. Robbins, 481 F.3d at 1148. The three-step withdrawal-
3 and-abeyance procedure goes as follows: (1) the petitioner amends his mixed petition
4 to remove the unexhausted claims; (2) the district court stays and holds the amended
5 and fully exhausted petition in abeyance; and (3) the petitioner re-amends his petition
6 to add the newly exhausted claims after litigating them in state court. Id. The newly
7 exhausted claims, however, must “relate back” to the claims in the fully exhausted
8 petition—that is, they must share a “common core of operative facts” with the
9 previously exhausted claims. Kelly, 315 F.3d at 1142-43 (quoting Mayle v. Felix, 545
10 U.S. 644, 659 (2005)).

11 *Petitioner is advised that it appears from the documents filed so far in this case
12 that the AEDPA’s one-year statute of limitations expired on May 12, 2010. If this is
13 so, and absent any equitable tolling to which he may be entitled, he would be granted
14 leave to amend his timely federal habeas petition with the newly exhausted claims only
15 if he can demonstrate that they relate back to the claims in his fully exhausted petition
16 under Mayle. If he is unable to demonstrate that the claims relate back, he will be
17 unable to litigate those claims in this Court.*

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19 **2. Second Option: Voluntarily Dismiss the Petition**

20 Petitioner may move to voluntarily dismiss his entire federal habeas petition and
21 return to state court to exhaust his unexhausted claims. Petitioner may then file a new
22 federal habeas petition containing only exhausted claims. See Rose, 455 U.S. at 510,
23 520-21 (stating that a petitioner who files a mixed petition may dismiss his petition to
24 “return[] to state court to exhaust his claims”).

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1 *Petitioner is cautioned, however, that any new federal habeas petition must be*
 2 *filed before the expiration of the one-year statute of limitations and in this case, as noted*
 3 *above, it appears the AEDPA's one-year statute of limitations expired on May 12,*
 4 *2010. Duncan v. Walker, 533 U.S. 167, 176 (2001); see 28 U.S.C. § 2244(d).⁴ The*
 5 *statute of limitations does not run while a properly filed state habeas corpus petition is*
 6 *pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir.*
 7 *1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that "an application is*
 8 *'properly filed' when its delivery and acceptance [by the appropriate court officer for*
 9 *placement into the record] are in compliance with the applicable laws and rules*
 10 *governing filings"); Bonner v. Carey, 425 F.3d 1145, 1149 (9th Cir. 2005) (holding that*
 11 *a state application for post-conviction relief which is ultimately dismissed as untimely*
 12 *was neither "properly filed" nor "pending" while it was under consideration by the state*
 13 *court, and therefore does not toll the statute of limitations), as amended 439 F.3d 993.*
 14 *However, absent some other basis for tolling, the statute of limitations continues to run*
 15 *while the federal habeas petition is pending. Duncan, 533 U.S. at 181-82.*

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⁴ 28 U.S.C. § 2244(d) provides:

18 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a
 19 person in custody pursuant to the judgment of a State court. The limitation period shall run
 from the latest of—

20 (A) the date on which the judgment became final by the conclusion of direct review or
 21 the expiration of the time for seeking such review;

22 (B) the date on which the impediment to filing an application created by State action
 23 in violation of the Constitution or laws of the United States is removed, if the applicant was
 prevented from filing by such State action;

24 (C) the date on which the constitutional right asserted was initially recognized by the
 Supreme Court, if the right has been newly recognized by the Supreme Court and made
 retroactively applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or claims presented could have
 been discovered through the exercise of due diligence.

26 (2) The time during which a properly filed application for State post-conviction or other
 27 collateral review with respect to the pertinent judgement or claim is pending shall not be
 counted toward any period of limitation under this subsection.

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1 **3. Third Option: Formally Abandon Unexhausted Claims**

2 Petitioner may formally abandon his unexhausted claims and proceed with his
 3 exhausted claim. Rose, 455 U.S. at 510, 520-21 (stating that a petitioner who files a
 4 mixed petition may “resubmit[] the habeas petition to present only exhausted claims”).
 5 However, Petitioner is cautioned that once he abandons his unexhausted claims, he may
 6 lose the ability to ever raise them again in federal court. See Slack v. McDaniel, 529
 7 U.S. 473, 488 (2000) (stating that a court’s ruling on the merits of claims presented in
 8 a first § 2254 petition renders any later petition successive); see also 28 U.S.C. §
 9 2244(a)-(b).⁵

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 11 **IV. CONCLUSION AND ORDER**

12 In light of the foregoing, the Court **ADOPTS** the Report in its entirety (Doc. 9),
 13 **OVERRULES** Petitioner’s objections (Doc. 11), and **DENIES** Petitioner’s motion for
 14 stay and abeyance (Doc. 3).

15 Because the Petition is mixed and in order to avoid dismissal, Petitioner must
 16 choose one of the following options (explained more fully above):

- 17 **1.) First Option: File a Motion for Withdrawal and Abeyance.** If Petitioner
 18 chooses this option, he must file a request for withdrawal and abeyance no

21 ⁵ 28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive
 22 habeas corpus application under § 2254 shall be dismissed unless:

23 (A) the applicant shows that the claim relies on a new rule of constitutional law, made
 24 retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
 or

25 (B) (i) the factual predicate for the claim could not have been discovered previously
 through the exercise of due diligence; and

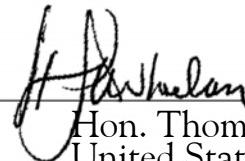
26 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a
 27 whole, would be sufficient to establish by clear and convincing evidence that, but for
 constitutional error, no reasonable fact finder would have found the applicant guilty of the
 28 underlying offense.

1 later than 30 days following the issuance of this order. Respondent may
2 file a reply no later than 45 days following the issuance of this order.

- 3.) **Second Option: Voluntarily Dismiss the Petition.** If Petitioner chooses
4 this second option, he must file dismissal papers no later than 30 days
5 following the issuance of this order.
6.) **Third Option: Formally Abandon Unexhausted Claims.** If Petitioner
7 chooses this third option, he must file a pleading with this Court no later
8 than 30 days following the issuance of this order.

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10 **IT IS SO ORDERED.**

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12 DATED: November 23, 2010

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16 Hon. Thomas J. Whelan
17 United States District Judge

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